HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Court's order whether the case is or not approved for reporting)
(Chapter VIII Rule 32 (2)(b)

Description of the Case.

Criminal Appeal No. 333 of 2003

Vinayak Bihari @ Vinayak Sharma … Appellants

Versus

State … Opposite Party

Approved for reporting

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~~Not approved for reporting.~~

Date of decision 29th October 2004.

Initial of Judge.

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IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL
Criminal Appeal No. 333 of 2003

Reserved

Vinayak Bihari @ Vinayak Sharma
S/o Ramji Bihari
R/o Village Kande Kanyal
Patwari Circle Bariniya
Tehsil & District Bageshwar … Appellant

Versus

State … Opposite Party

Sri. S.K. Mandal learned counsel for the appellant
Sri Amit Bhatt A.G.A. for the State

Coram:-Hon'ble M.M. Ghildiyal, J.
Hon'ble B.C. Kandpal, J.

(Delivered by Hon. B.C. Kandpal, J.)

This criminal appeal arises out against the judgment and order dated 09.10.2003 passed by Special Sessions Judge, Bageshwar in S.T. Suit No. 29 of 2001 State Vs. Vinayak Bihari @ Vinayak Sharma & others convicting the appellant under Section 376 I.P.C. and sentencing him to 10 years R.I. and fine of Rs. 5000/- and further convicting under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentencing him to life imprisonment as well as fine of Rs. 5000/- and in default of payments further one year more imprisonment.

Brief facts of the prosecution case are that one Joga Ram lodged a First Information Report on 09.03.2001 at 7:00 P.M. with Patwari Patti Circle Bajina, Bageshwar stating therein that on 09.03.2001 at about 5:45P.M. his daughter Kumari Pushpa along with her companion Kumari Bhagirati had gone to cut the

grass. The appellant Vinayak Bihari @ Vinayak Sharma along with his companion was present there nearby the jungle and when these persons saw Kumari Pushpa and her companion all alone then the appellant Vinayak Bihari and his companion went to Kumari Pushpa and pushed to her on the earth. The appellant shut the mouth of Kumari Pushpa with his hand and thereafter torn the trouser of Kumari Pushpa. The appellant after doing all this committed rape upon Kumari Pushpa. Kumari Pushpa anyhow could reach to the house of one Pitamber Joshi and from there she was shifter to her house in a semi-necked position.

After the registration of the case, Kumari Pushpa was subjected to medical examination and doctor Smt. Usha Jangpangi examined her on 10.03.2001 at 4:00P.M. The doctor during the medical examination found that the hymen was recently torn and the scar was not healed up. The doctor also found slightly bleeding present over there and there was tenderness on the vagina. The doctor also found that the vagina was admitting one finger. For ascertaining the age of Kumari Pushpa, doctor sent for Radiologist and the Radiologist after performing the necessary examination opined that the age of the prosecutrix was below the age of 17 years. The Investigating Officer – Ganga Ram Tamta (P.W.6) Patwari conducted the investigation and also sent the recovered trouser and sweater belonging to the prosecutrix for chemical examination to the examiner. The chemical examiner sent the report that the male semen and the blood spots were found in the aforesaid cloths. The chemical examiner also found the male sperms on the trouser.

The Investigating Officer after completing the investigation submitted the chargesheet against the accused Vinayak Bihari @ Vinayak Sharma under Sections 376, 354 and 323 I.P.C. and under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Learned Sessions Judge on 20.03.2003 framed charges under Section 376 I.P.C. and under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 against the accused. The accused/appellant denied of the charges leveled against him and claimed his trial.

The prosecution in order to support its case of the accused produced Joga Ram (PW 1), Kumari Pushpa (PW 2), P.C. Gurrani (PW 3), Bhagirathi Devi (PW 4), Dr. Usha Janpangi (PW 5) and Sri Ganga Ram Tamta (PW 6).

After the evidence of the prosecution was over, the statement of the accused was recorded under Section 313 Cr.P.C. The accused did not adduce any evidence in his defence.

Learned trial court after having perused the entire evidence on record and hearing the learned counsel for the parties, convicted the accused Vinayak Bihari @ Vinayak Sharma under Section 376 I.P.C. and sentenced him to 10 years R.I. and fine of Rs. 5000/- and further convicted under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentenced him to life imprisonment as well as fine of Rs. 5000/- and in default of payment further one year more imprisonment vide judgment and order dated 09.10.2003.

Feeling aggrieved by the aforesaid impugned judgment and order the convict Vinayak Bihari preferred appeal before this Court, which has been placed before us for disposal.

We have heard learned counsel for the parties and perused the record.

Perused of the record shows that the occurrence was committed on 09.03.2001 at 5:45 P.M. and the First Information Report of the incident was lodged by Joga Ram (P.W.1) father of the prosecutrix on the same day at about 7:00 P.M. The distance of the Police Station from the place of the occurrence is about 3 Kms. Therefore, keeping in view the distance of the Police Station from the place of the occurrence, it cannot be said that there is any delay in lodging the First Information Report. The promptness in lodging the First Information Report itself discard / discredit the possibility of any type of manipulation.

In the instant case, it is the evidence of the prosecutrix which would be relevant and so far as the occurrence of rape is concerned, there is sufficient evidence on record to prove the same. The prosecutrix, Kumari Pushpa (PW-2) has categorically stated about her being raped by the appellant. She has been produced as PW-2 before the trial court and she has stated that she had gone to cut the grass from the jungle and one Kumari Bhagirati was also accompanying her. She has further stated that at the place of occurrence, the appellant Vinayak Bihari caught told her hand and then pushed her to earth, thereafter, he subjected her to rape. The prosecutrix, Kumari Puspa (PW-2) has also categorically stated that her hymen was torn and there was bleeding on account of the rape committed upon her. She has also stated that she defalcated during the

course of the occurrence and when she reached to her house, her dirt was cleaned and she was taken to Patwari Choki, thereafter, she was taken to hospital for medical examination. She has also stated that her torn trouser was also handed over to Patwari. This witness has also stated that at the time of the occurrence she was studying in class 4th. She has also stated as yet the menstruation to her was not started. Therefore, keeping in view the deposition of the prosecutrix, it becomes quite clear that the prosecutrix was subjected to rape by the appellant and none else.

The medical examination report also shows that when the prosecutrix was medical examined, the doctor found that the hymen was recently torn and the scar was not healed up. The doctor also found slight bleeding in her vagina. The doctor also found the edges of the hymen were not regular and also found tenderness in the vagina. The medical examination report pertaining to the prosecutrix clearly suggests that she was subjected to rape on the alleged date and time of the occurrence.

Learned counsel for the appellant has submitted that there was not external mark of injury on the person of the prosecutrix, therefore, it cannot be said that the prosecutrix was forcibly subjected to rape by the appellant. He has submitted that in fact, it is a case of consent and only on account of the same no external mark of injury was found on the person of the prosecutrix.

We fail to appreciate the arguments advanced by the learned counsel for the appellant. The Hon'ble Apex Court in a case reported in **2004 Supreme Court Cases (Criminal) 678 Dastagir Sab and Another Vs State of Karnataka** has categorically observed that "*presence of injury on the body of*

the victim, is not a sine qua non to prove a charge of rape. Absence of injury having regard to overwhelming ocular evidence cannot, thus, be a sole criterion for coming to a conclusion that no such offence had taken place".

Therefore, in view of the aforesaid decision, we are of the definite opinion that absence of injury on the person of the prosecutrix will not discredit her testimony in any manner.

Learned counsel for the appellant has further argued that it is a case which is based upon the sole testimony of the prosecutrix and the testimony of the prosecutrix finds no corroboration with the medical evidence.

We again find ourselves in total disagreement with the submission advanced by the learned counsel for the appellant. We have already observed that the medical evidence clearly indicates that prosecutrix Kumari Pushpa (PW-2) was subjected to rape. The way she was taken to her house from the place of the occurrence and the observation made by the doctor during her medical examination are certainly indicative of the fact that Kumari Pushpa (PW-2) was subjected to rape by the appellant. We also do not find any justification for disbelieving the testimony of the prosecutrix. The prosecutrix is not in enimical terms with the appellant in any manner and the father of the prosecutrix has also no enimous with the appellant. Therefore, we do not find any reason as to why the prosecutrix and her father will falsely implicate the appellant in this type of heinous crime.

Learned counsel for the appellant has argued that another girl who was accompanying the prosecutrix at the time of the occurrence has turned hostile. Therefore, the conviction could not be based on a weak evidence of the prosecutrix.

We find no substance in the argument. It is true that Bhagirati has turned hostile but she has admitted this much of fact that she was in the company of Kumari Pushpa (PW-2) at the time of the occurrence. She has also stated that as soon as she saw the head of the accused she ran away from the place of the occurrence and she could not witness the actual incident of rape. This witness has admitted that she was also cutting grass in the company of Kumari Pushpa (PW-2) at the time of occurrence. Therefore, under these circumstances, it cannot be said that the conviction is based exclusively on the sole testimony of the prosecutrix. This witness has specifically admitted the presence of the prosecutrix at the alleged time and place of the occurrence.

As far as the actual commission of rape is concerned, there cannot be any better person except the prosecutrix to narrate the tale. An accused cannot cling to a fossil formula and insist of corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes the judicial mind as probable. The judicial response to human rights cannot be blunted by legal jugglery. In the Indian setting refusal to act on the testimony of the victim of the sexual assault in the absence of corroboration as a rule, is adding insult to injury.

Our attention has been invited by the learned counsel for the appellants towards the specific question which was put to Joga Ram (PW-1) father of the prosecutrix by the defence that her daughter Kumari Pushpa (PW-2) did not tell her as to how rape was committed upon her. The reply was given by Joga Ram (PW-1) that how could her daughter narrate the incident of rape to him as he could understand the entire episode by visualizing the condition of her daughter.

A girl in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had occurred. She would be conscious of the danger of being ostracized by the society and when in the fact of these factors the crime is brought to light, there is an inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex offence is entitled to great weight, absence of corroboration not withstanding.

To insist on corroboration except in the rarest of rare cases is to equate one who is a victim of a lust of another with an accomplish to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars as in the case of accomplish to a crime. Why should the evidence of a girl who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with the lenses tinged with doubt, disbelief or suspicion? Therefore, the plea of the learned counsel of the appellant about lack of corroboration in the instant case has no substance.

Further, the testimony of the prosecutrix also cannot be discarded on this ground that the semen was found on the *Salwar* of the prosecutrix which was taken in possession by the Patwari immediately after the occurrence.

We have perused the paper no. 17-Ka on the record, which shows that on the trouser, semen was found by the chemical examiner. As per the report of the chemical examiner,

the sperm was also found on the trouser. Therefore, presence of semen on the cloth of the victim clearly corroborates her evidence. The prosecutrix was wearing at the relevant point of time the trouser and the sweater. The trouser was found torn and it was seized by the Investigating Officer subsequent to the complaint filed by Joga Ram (PW-1) and the cloths were subjected to chemical analysis by the Investigating Officer. The result of the analysis disclosed that the presumptive chemical test for the presence of seminal stain was found positive on the trouser and the sweater which the prosecutrix was wearing at the time of the occurrence and were subsequently seized from her possession by the Investigating Officer.

Therefore, the evidence adduced by the prosecution establishes the guilt of the appellant beyond reasonable doubt and as per the evidence available on record, it is quite clear that it was the appellant and none else who subjected rape upon Kumari Pushpa (PW-2).

Rape certainly affects the dignity of woman as and when a woman is ravished what is inflicted is not merely physical injury but deep sense of some deathless shame. Therefore, to our mind the appellant has committed a serious act.

Learned counsel for the appellant has further argued that the prosecutrix had in fact attained the age of discretion and the surrounding circumstances show that she was a consenting party. Our attention has been invited towards the statement of the doctor/radiologist who has stated that the age of the prosecutrix on the basis of the epiphysis, could be ascertained below 17 years.

Again we fail to appreciate the argument advanced by the learned counsel for the appellant. In case, if the doctor has opined that the age of the prosecutrix was below 17 years then it can not be ascertained that she was positively more than 16 years of age on the date of the occurrence. Dr. PC Gurrani - Radiologist (PW-3) has categorically deposed that on the basis of the X-ray plates the age of the prosecutrix Kumari Pushpa was below 17 years. The report prepared by this doctor shows that the epiphysis at wrist joint was not fused. Therefore, in view of the fact that the wrist joint epiphysis was not fused, the age of the prosecutrix cannot be said to be more than 16 years at the time of the occurrence.

Moreover, for the sake of the argument, if it is admitted that the prosecutrix had attained the age of discretion, i.e., 16 years at the time of the occurrence. Even than on the basis of her deposition, it cannot be said in any manner that she was a consenting party. Therefore, we do not find any reason to disbelieve the testimony of the prosecutrix and we are of the definite opinion that Kumari Pushpa (PW-2) prosecutrix was subjected to rape by the appellant against her wishes.

On the basis of the assessment of evidence, we come to the conclusion that the trial court has rightly convicted the appellant u/s 376 IPC and sentenced him to 10 years RI and fine of Rs. 5,000/-. The sentence imposed against the appellant for the charge of the rape appears to be adequate. We do not find any ground for interference in the impugned judgment and order passed by the court below as far as the charge u/s 376 IPC and the sentence imposed thereon is concerned.

However, the trial court has awarded imprisonment for life under the provisions of Section 3(2)(v) of

the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and fine of Rs. 5,000/-. The sentence awarded by the trial court under the aforesaid provision appears to be inadequate on the following grounds:

Provision of Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 produce as under:-

> *"3(2)(v). Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Schedule Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine."*

Bare reading of the aforesaid provision would reveal that the conviction under Section of the aforesaid Act is altogether a different thing as the aforesaid provision clearly indicate that the offence under IPC should be established by the prosecution to have been committed on the ground that the injured person or persons against whom offence is committed is a member of Scheduled Castes or Scheduled Tribes. It is not sufficient that the injured person should be a member of either but further it is required to be proved that the offence has been committed on the ground of victim being a member of Scheduled Castes or Scheduled Tribes. In absence of this material merely because the injured / prosecutrix happens to be Scheduled Castes or Scheduled Tribes, automatically the offence under Section

3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is not made out.

There is no material on record indicating that the rape was committed on the ground that the prosecutrix was a member of the Scheduled Castes or Scheduled Tribes. The fact that the prosecutrix is a member of Scheduled Castes is not in dispute. However, in absence of material that the offence has been committed on the ground of the victim being a member of the Scheduled Castes, the conviction under the aforesaid provision of the Act cannot be sustained.

In view of the aforesaid discussion, conviction of the appellant under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the sentence imposed thereon cannot be sustained and accordingly are liable to be set aside.

With the result, this criminal appeal is therefore, partly allowed to the extent that the conviction under Section 376 IPC is confirmed while conviction of the appellant under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is set aside.

The record of the court below be returned immediately & learned C.J.M. concerned is directed to take appropriate steps for making necessary compliance of the order accordingly.

(B.C. Kandpal, J.) **(M.M. Ghildiyal, J.)**

October 29, 2004
Shiv